No. 167

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH K[illegible]IGER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

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Appellee contends that the statute upon which the information was based "compels a person to be a witness against himself." (R. 3).[1] The court below did not pass upon that contention. *United States* v. *Spector*, 343 U. S. 169, 172, and *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 330, indicate, however, that even though the appeal is under the Criminal Appeals Act, the Court may consider a constitutional issue which is not the basis of the decision appealed from. But cf. *United*

[1] The other points raised in appellee's brief, pp. 56 to 59, and not discussed in the Government's main brief do not present substantial questions.

States v. *Borden Co.*, 308 U. S. 188; *United States* v. *Beacon Brass Co.*, decided November 10, 1952.

THE REGISTRATION PROVISIONS OF THE TAX ON WAGERING DO NOT VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION

Although the argument as to self-incrimination seems to have been directed at all of the provisions of the wagering tax law (R. 3), it can relate only to the registration provisions involved in Count II of the information. Count I, which charges appellee with having willfully failed to pay the tax, would not be affected. It is settled that the Fifth Amendment does not make it unconstitutional to tax an unlawful occupation such as gambling. See *Rutkin* v. *United States*, 343 U. S. 130, 137, 140 (dissent), and cases cited at p. 9 of the Government's main brief. Accordingly, Count I of the information must be sustained irrespective of how this question may be decided.

We submit that the registration requirements of §3291 clearly do not violate the Fifth Amendment. In the first place, the occupation taxed is unlawful only under state laws, and the federal privilege against self-incrimination protects only against inquiries incriminatory under federal law (pp. 3-13, *infra*). Secondly, §3291 is not made incriminatory by reason of the existence of the federal statutes prohibiting use of the mails or interstate commerce for the transportation of lottery tickets or related matter. (Pp. 13-24, *infra*.) And finally we shall argue that the Fifth Amendment does not apply to information required to be filed as an official record when necessary for tax collection purposes any

more than for other legitimate regulatory purposes. (Pp. 24-30, *infra*).

A. THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT PROTECT AGAINST DISCLOSURE OF VIOLATIONS OF STATE LAW.

Section 3290 imposes a tax on the occupation of wagering. Wagering is doubtless unlawful in many states (perhaps in all but Nevada), but it is not forbidden by any federal law.

Thus the registration statement in which the taxpayer is required to set forth his name, address and places of business, and the names and addresses of his agents or principals does not call for a disclosure of information which will reveal a violation of federal law.

It is established that the self-incrimination clause of the Fifth Amendment only relates to information incriminatory under federal law. This principle, for which the decision of a unanimous Court in *United States* v. *Murdock*, 284 U. S. 141, is the leading authority, was foreshadowed by earlier cases holding that an immunity statute gives all the protection to which a person is constitutionally entitled if it protects against prosecution by the Government compelling him to testify. *Brown* v. *Walker*, 161 U. S. 591, 606; *Jack* v. *Kansas*, 199 U. S. 372, 891; *Hale* v. *Henkel*, 201 U. S. 43; 68. And the holding in the *Murdock* case has since been referred to with approval in *Feldman* v. *United States*, 322 U. S. 487, 491-492.

Murdock had been summoned by a federal revenue agent to appear before him and disclose the recipients of certain deductions he had claimed in

his federal income tax. The record indicated that he had been operating gambling machines in violation of the Illinois gambling laws, and had been paying the amount claimed as a deduction to state officials for permission to do so.[2] He appeared but refused to make the disclosures, asserting that to do so would incriminate him under state law. This Court, holding that the federal privilege did not extend to protection from state prosecution, said (284 U. S. at 149):

> The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. *The investigation was under federal law in respect of federal matters.* The information sought was appropriate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients. *Investigations for federal purposes may not be prevented by matters depending upon state law.* Constitution, Art. VI, §2. [Italics supplied.]

The passage quoted clearly applies to the case at bar. In both cases a person who may have been violating state gambling laws was asked for information needed to collect a federal tax. Since *Murdock* involved an investigation of the affairs of the witness himself and not merely a general

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[2] See 284 U. S. 142-143, 144; Transcript of Record No. 38, 1931 Term, R. 22-23.

registration requirements, the "setting" [3] was much closer to an incriminating one. Nevertheless in that case, because the investigation "was for federal purposes", not to discover evidence of state crimes, its relation to matters of state law was deemed irrelevant. The same reasoning would apply even more clearly to the general requirement as to the reporting of information needed for the collection of the federal taxes on wagering.

The *Murdock* opinion continued with the passage quoted approvingly in the *Feldman* case:

> This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity *against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination.* *Counselman* v. *Hitchcock,* 142 U.S. 547. *Brown* v. *Walker,* 161 U.S. 591, 606. *Jack* v. *Kansas,* 199 U.S. 372, 381. *Hale* v. *Henkel,* 201 U.S. 43, 68. [Italics supplied]

The obvious reason why "complete immunity against prosecution by the government compelling the witness to answer" (the Federal government

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[3] See *Hoffman* v. *United States,* 341 U.S. 479, 486, see pp. 20-21, *infra.*

in that case) was said to be "equivalent to the protection furnished by the rule against compulsory self-incrimination" was that the rule itself protected only against prosecution by that government.

The doctrine of the *Murdock* case has been given effect in many cases in the Courts of Appeals. *United States* v. *St. Pierre*, 128 F. 2d 979, 980 (C.A. 2); *Camarota* v. *United States*, 111 F. 2d 243 (C.A. 3), certiorari denied, 311 U.S. 651; *Miller* v. *United States*, 95 F. 2d 492 (C.A. 9); *Graham* v. *United States*, 99 F. 2d 746 (C.A. 9); *United States* v. *Feldman*, 136 F. 2d 394 (C.A. 2).

The continued vitality of the rule of the *Murdock* case is not the result of adherence to precedent alone. The rule is one expression of the separation between state and federal systems of law that is part and parcel of our federal constitutional system. Thus, this Court in *Feldman* v. *United States*, 322 U.S. 487, which held that the Fifth Amendment does not forbid the use in a federal prosecution of testimony previously given in a state proceeding under a state immunity, said (322 U.S. at p. 490):

> But for more than one hundred years, ever since *Barron* v. *Baltimore*, 7 Pet. 243, one of the settled principles of our Constitution has been that *these Amendments* [*Fourth and Fifth*] *protect only against invasion of civil liberties by the Government whose conduct they alone limit.* *Brown* v. *Walker*, 161 U.S. 591, 606; *Jack* v. *Kansas*, 199 U.S. 372, 380; *Twining* v. *New Jersey*, 211 U.S. 78. Con-

versely, a State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere. The distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system, howsoever complicated and difficult the practical accommodations to it may be. * * * [Italics supplied]

And the *Feldman* opinion (at pp. 493-494) referred again to the "principle of [the *Jack*] and later cases as to the separateness in the operation of state and federal criminal laws and state and federal immunity provisions."[4]

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[4] The *Feldman* case also answers appellee's argument (pp. 61-64) based upon language in earlier decisions as to the unlikelihood of use by one sovereign of information revealed under compulsion to another and the significance of this factor. The last paragraph of the *Feldman* opinion (322 U.S. at 493-494) states:

> Only a word need be said about the phrase of scepticism in *Jack* v. *Kansas*, *supra*, at 380, that it could hardly be imagined "that such prosecution would be instituted under such circumstances." The "prosecution" and the "circumstances" there referred to were a prosecution on the same facts for violation of the state and the federal anti-trust laws. But see *Fox* v. *Ohio*, 5 How. 410, 435; *United States* v. *Lanza*, 260 U.S. 377. The cautionary words in *Jack* v. *Kansas* in nowise qualified the principle of that and later cases as to the separateness in the operation of state and federal criminal laws and state and federal immunity provisions. There are, as we have already seen, ample safeguards. If a federal agency were to use a state court as an instrument for compelling disclosures for federal purposes, the doctrine of the *Byars* case, *supra*, as well as that of *McNabb* v. *United States*, 318 U.S. 332, afford adequate resources against such an evasive disregard of the privilege against self-crimination. See *United States* v. *Saline Bank*, 1 Pet. 100; *United States* v. *McRae*, L. R. 3 Ch. App. 79. Nothing in this record brings either doctrine into play.

One reason why the federal privilege can apply only to federal offenses lies in its relation to the power to obtain testimony by granting immunity. That Congress possesses such power is, of course, well established. But the power of Congress to grant immunity from state prosecution is certainly questionable. The consequence would be that, if the federal constitutional privilege encompassed state offenses, there might often be no way in which the Federal Government could obtain necessary information—and the same obstacle would bar the states in the converse situation. This practical consideration may underlie the immunity cases running from *Brown* v. *Walker* to *Feldman* in their insistence upon keeping the federal and state privileges limited to their own spheres.

In the present context, serious difficulties would be created if an essential enforcement provision in an otherwise unexceptionable taxing measure were invalidated. Federal income tax returns require information which often might disclose violations of state law, as the *Murdock* case itself illustrates. Any state offense having a pecuniary aspect, from robbery to gambling, could be set up as an excuse for not reporting one's income, or of denying to the Treasury information needed in order to administer the tax laws effectively, if the federal constitutional privilege protected against disclosures of state violations in tax returns. In particular the oft-sustained power of Congress to tax any occupation, irrespective of its legality under state law, would be severely limited or rendered

ineffective. See the *Doremus, Nigro, Sonzinsky, Sanchez,* and *License Tax* cases discussed in the Government's main brief. Moreover, more than the disputed registration requirements are at stake, for a tax could hardly be collected without requiring those subject to it to report at least their names and addresses, and the fact of payment, although this, in itself, could be a link in the chain of incrimination under the state law. Cf. *Hoffman* v. *United States,* 341 U. S. 479.

An immediate and significant consequence would be that the existing federal taxes, upheld in the cases cited, on activities illegal in many states would be adversely affected.[5] An important feature of the Marihuana Tax Act is the requirement that every person who imports, manufactures, sells, or deals in marihuana must pay a special tax and register his name and place of business with the collector of the district in which his business is carried on (26 U.S.C. 3230(a)(5), 3231). 26 U.S.C. 3236 makes this information available to the public, including presumably, state law enforcement officers.

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[5] In connection with appellee's contention that the Wagering Tax Act is not a revenue measure, the following comparison with the sums collected under other taxes, the validity of which has been sustained, may be pertinent (*Summary of Internal Revenue Collections*, released by Bureau of Internal Revenue October 3, 1952):

Wagering, excise	$4,371,869
Wagering, special	973,197
Adulterated and process or renovated butter, and filled cheese	3,501
Narcotics, including marihuana and special taxes	914,910
Firearms transfer and occupational taxes	28,[illegible]

The Uniform Narcotic Drug Act has been adopted in most states and territories of the United States. Section 2 of the Act makes it unlawful for any person to manufacture, possess, sell, etc., any narcotic drug, except for certain medicinal and other purposes authorized by the Act. Section 1(14) defines "narcotic drug" as including cannabis, or marihuana, which in Section 1(13) is defined as it is in the Marihuana Tax Act, *supra*.[6] With slight variations in the definition of marihuana employed, 38 states and territories have adopted the Act in a form that prohibits manufacture, sale, etc. of marihuana.[7] Similarly, the National Firearms Act, which requires persons who deal in machine guns, "sawed off" shotguns, and silencers (26 U.S.C. 3261 (a)), and those who own such weapons (3261(b)), to register with the collector of the district in which they reside, would be jeopardized. Under the laws of many states it is unlawful to possess or to deal in weapons of the type comprehended by the Act,[8] so that registration

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[6] The original definition used in the Uniform Narcotic Drug Act was modified to conform with that of the federal act. See 1942 Commissioners' Comments, Uniform Narcotic Drug Act, §1, 9A U.L.A.

[7] These are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, Wyoming. Statutory Notes, Uniform Narcotic Drug Act, §1, 9A U.L.A.

[8] Delaware (sale or possession of silencers prohibited, Laws of 1937, c. 212); Iowa (sale of silencers and possession of machine guns prohibited, Code 1946 §§ 695.18, 696.1; Massa-

either as a dealer in or an owner of firearms as defined in the statute would expose one to local prosecution. Were appellee's contention to be accepted that federal constitutional privileges would be violated by requiring one engaged in an enterprise unlawful under state law to register, then these provisions, implicitly approved by this Court in the *Sanchez* and *Sonzinsky* cases, would fall.

In addition, the federal revenue from excise taxes on the manufacture of distilled spirits would be jeopardized. (26 U. S. C. 2800(1).) Every person engaged in the business of distilling is required to give notice of that fact to the collector of the district in which the business is carried on, giving his name, his address, the names and addresses of others in the firm, and the precise location of the business. (26 U. S. C. 2812.) In states where it

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chusetts (possessing machine guns and sawed-off shotguns, sale of silencers forbidden, Laws 1932, c. 269 § 10, Supp. 1951, c. 269, § 10A); Minnesota (selling or possessing silencers forbidden, Stat. 1947, § 615.11); Mississippi (manufacture, sale, and possession of silencers forbidden, Code 1942, §2376); Missouri (sale and possession of machine guns to and by general public prohibited, Revised Stats. 1939, §4819); Nebraska (sale of machine guns except to law officer prohibited, Revised Statutes 1943, §28-1010; possession of same unlawful, §28-1011; New Jersey (sale of machine guns unlawful, Statutes 1939, §2-176-50; manufacture, sale, etc., of silencer forbidden, §2-176-14); New York (sale of machine guns to public prohibited, Penal Law (McKinney, 1952) §1896); North Carolina (sale of machine guns unlawful, with limited exceptions, General Statutes 1943, §14-409); North Dakota (use and sale of silencers prohibited, Revised Code 1943, §62-0401); South Carolina (possession, sale, etc., of firearms to general public, unlawful, Code, 1942, §1258-1); Vermont (manufacture, sale, and use of silencers forbidden, Statutes 1947, § 8281).

is unlawful to manufacture distilled spirits,[9] such registration would clearly be incriminatory, and, on appellee's theory, unconstitutional. Furthermore, a very real difficulty would arise with regard to distillers in all states who are operating without complying with local regulatory provisions. They might also claim that the filing of the reports required for the federal tax would serve to incriminate them under state law. Nevertheless, in *United States* v. *Constantine*, 296 U. S. 287, where the defendant had in fact paid the annual tax of $25 on dealing in liquor, "despite the fact that he was violating local law in prosecuting his business" (296 U. S. at 294), this Court made it plain that the sole doubt was as to the validity of the added $1000 tax which was conditioned on violation of state law.

Thus, it is clear that to allow the possibility of incrimination under state law to excuse registration under a valid federal tax statute, contrary to the import of the doctrine of the *Murdock* case, would have far-reaching consequences. Not only would registration features crucial to enforcement be eliminated where the activity taxed is unlawful under state law, but there would be a question as to the power of Congress to tax such activities at

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[9] Mississippi Code (1942) § 2631 makes manufacturing any "vinous, malt, spirituous, or intoxicating liquor or drink which if drunk to excess will produce intoxication" a felony, punishable by one to three years' imprisonment.

Oklahoma Statutes (1937) Title 37, §1 makes it a misdemeanor to manufacture, sell, or otherwise furnish any liquor containing more than 3.2 per cent of alcohol.

all since payment of the tax would itself be incriminating. Moreover, an attempt by Congress to avoid losing all revenues from activities unlawful in only some states by exempting those states from the effect of the tax would probably be doomed because the Constitution requires that excises be imposed uniformly throughout the United States (Art. I, Sec. 8).[10] See *Downer* v. *Bidwell*, 182 U. S. 244; *Fernandez* v. *Wiener*, 326 U. S. 340, 359.

B. THE WAGERING TAXES AND REGISTRATION PROVISIONS DO NOT REQUIRE INCRIMINATION UNDER THE FEDERAL LOTTERY ACTS.

Appellee argues in his brief (p. 64) that the registration provisions of the present Act compel him to give testimony incriminatory under federal as well as state law, citing the federal lottery laws, 18 U. S. C. 1301, 1302, which prohibit interstate commerce in lottery tickets and the use of the mails to distribute lottery tickets and other documents pertaining to lotteries.

1. *Registration as required by this statute does not signify that the registrant is necessarily engaged in running a lottery, nor,* a fortiori, *does it indicate that he is violating the Federal Lottery Acts.*

It is to be noted that the wagering taxes must be paid by many persons who do not violate the lottery laws. In the first place, the taxes on wagering

[10] If a federal excise limited to the states where the activity taxed was lawful were held not to conflict with the uniformity provision, the door would be opened for state legislatures to seek to immunize residence of their states from federal excises by declaring the activities unlawful without any bona fide intention of bringing prosecution.

apply to many transactions which are not lotteries. For wagering is defined as meaning:

> (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit. [26 U. S. C. (Supp. V) 3285(b)(1).]

"Lottery" is then defined to include "the numbers-game, policy, and similar types of wagering", but to exclude games of a type usually played in the presence of all the parties, and drawings conducted by and for the benefit of charitable organizations. 26 U. S. C. (Supp. V) 3285 (b)(2).

Wagering in lotteries is thus only one of three types of gambling transactions covered by the taxes on wagers. Persons covered by Class A, which includes book-making on horse races, would not be engaged in a lottery.[11] The many persons subject

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[11] To qualify as a lottery under the federal lottery statutes, three elements are necessary: prize, consideration, and chance. *Eastman* v. *Armstrong-Byrd Music Co.*, 212 Fed. 662 (C.A. 8); *National Conference on Legalizing Lotteries, Inc.* v. *Farley*, 96 F. 2d 861 (C.A. D.C.). The first two elements are present in wagering on sports events, but the third, chance, has been held to be absent since the wagerer's success depends upon "the exercise of knowledge, skill and judgment" rather than "the operation of artificial forces which characterize schemes based upon 'lot or chance,' as used in the lottery statute." *United States* v. *Rich*, 90 F. Supp. 624, 630 (E.D. Ill.) (bookmaking on the outcome of horse racing, baseball, elections, and other events of uncertain outcome); cf. *Forte* v. *United States*, 83 F. 2d 612 (C.A. D.C.) (numbers scheme based on race results held a lottery because it did not involve direct betting on

to the wagering tax because of transactions other than lotteries could not possibly be incriminating themselves under the lottery laws by filing the registration statement.

In the second place, persons conducting lotteries may not be using the mails or interstate commerce. The reports of the Kefauver Committee indicate that although book-making was conducted on an interstate basis through the use of wire services,[12] this was not true of the policy or numbers game, which is a form of lottery. In Philadelphia the numbers game was described "as operated in the main by local characters" (S. Rep. 307, 82d Cong., 1st sess., at 49). The description of the numbers game in Chicago, which may well be typical, reveals that the betting is handled by hundreds of low paid employees and so-called commission writers, some of whom go "from door to door" (*id.*, at 56). The hand-to-hand transmission of number slips may in part be the result of efforts to avoid violating the federal lottery laws by not sending anything through interstate commerce or the mails. The Kefauver Committee so suggested with respect to

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horse races). The preponderance of state authority holds that betting on sports events is not a lottery. *Commonwealth* v. *Kentucky Jockey Club*, 238 Ky. 739, 38 S. W. 2d 987; *People* v. *Reilly*, 50 Mich. 384, 15 N. W. 520; *People ex rel. Lawrence* v. *Fallon*, 152 N. Y. 12, 46 N. E. 296; *People* v. *Lyttle*, 251 N.Y. 347, 167 N. E. 466. See Pickett, *Contests and the Lottery Laws*, 45 Harv. L. Rev. 1196, 1216 (1932), where the author says with regard to betting on horse races: "It is usually held that no lottery is involved, although there may be an infraction of statutes prohibiting betting."

[12] S. Rep. 141, 82d Cong., 1st sess., pp. 10-25; S. Rep. 307, 82d Cong., 1st sess., p. 53.

the "Treasury balance lottery racket", which it described as "another interstate gambling empire of impressive proportions, which has grown up in defiance of the old lottery law by decentralizing its operations and attenuating its interstate ties". S. Rep. 725, 82d Cong., 1st sess., p. 89.

It thus appears that the two principal types of gambling discussed by the Committee will generally not be in violation of the lottery laws, because book-making is not regarded as a lottery and because the persons engaged in the policy or numbers games often deliberately avoid trouble with the Federal Government by not using interstate commerce or the mails.

The present significance of these facts is that the many persons subject to the wagering taxes, who for the above reasons do not violate the lottery laws, would not be incriminating themselves under those laws by filing the registration statements required for the wagering taxes. It thus cannot be said that on its face registration would be incriminating under the federal statutes. At most, this would be so for those wagering taxpayers who engaged in lotteries through interstate commerce or the mails—and this may well be a small proportion of the persons subject to the wagering taxes.[13]

2. *The privilege must be claimed as to particular questions; it does not excuse failure to file a return or registration statement.* Since many persons subject to the wagering tax will not have rea-

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[13] We know of no accurate statistics as to these matters.

son to fear the Federal lottery laws, there is good reason for subjecting such taxpayers to the same requirement as other witnesses, namely that they must claim their privilege if they do not wish to give the incriminating information. As this Court recently stated in *Rogers* v. *United States,* 340 U.S. 367, 370-371:

> If petitioner desired the protection of the privilege against self-incrimination, she was required to claim it. *United States* v. *Monia,* 317 U.S. 424, 427 (1943). The privilege "is deemed waived unless invoked." *United States* v. *Murdock,* 284 U. S. 141, 148 (1931).[14]

See also *Vajtauer* v. *Commissioner,* 273 U.S. 103, 112; *Smith* v. *United States,* 337 U.S. 137, 147.

The problem is no different from that presented by income tax returns.[15] Such returns provide for disclosure, *inter alia,* of the sources of one's income. Disclosure of sources might well be incriminating as to some taxpayers if they were engaged in activity forbidden by federal law, such as receiving bribes or robbing banks. But this does not mean that anyone can avoid filing a return. If an answer will be incriminating as to a particular taxpayer, he must claim his privilege as to that. He cannot refuse to file any return at all.

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[14] The dissent did not challenge this principle.

[15] In this portion of the argument we are assuming that the privilege against self-incrimination applies to tax returns to the same extent as to the examination of a witness in court or before a grand jury, although we argue below that it does not. See pp. 19-30, *infra.*

United States v. *Sullivan*, 274 U.S. 259, is directly in point. Defendant was convicted of refusing to file an income tax return. It was assumed that his income "was derived from business in violation of the National Prohibition Act" (p. 263). The Court held that he could be punished for not filing a return even if he were entitled to withhold information, a point which the Court found it unnecessary to decide. The opinion of Mr. Justice Holmes states (274 U.S. at 263-4):

> As the defendant's income was taxed, the statute of course required a return. See *United States* v. *Sischo*, 262 U.S. 165. In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, *but could not on that account refuse to make any return at all.* We are not called on to decide what, *if anything*, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any

word upon the government blank would bring him into danger of the law. *Mason* v. *United States*, 244 U. S. 362. *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103. In this case the defendant did not even make a declaration, he simply abstained from making a return. [Italics supplied.]

In Count II of the information in the instant case [16] taxpayer is charged with having failed to register for the occupational tax on wagering. Since what is called "registration" is in fact merely the filing of a statement containing information as to names, addresses, and places of business, failure to register is the equivalent of failure to file a return under other taxes. If appellee believed some of the questions on the registration form (R. 9) to be incriminating under federal law in so far as he was concerned, he could "have raised the objection in the return [registration statement], but could not on that account refuse to make any return [statement] at all" (*Sullivan*, at p. 263), just as in the *Sullivan* case.

3. *The "link in the chain" test of self-incrimination should not be as rigidly applied to registration and reporting requirements of the federal revenue laws as to other types of inquiries.* As has been pointed out, the information which a registrant must furnish would certainly not be directly in-

[16] As has been pointed out, *supra*, p. 2, appellee's argument based on the privilege against self-incrimination would have no application to Count I.

criminating under the lottery Acts, which are the only federal statutes upon which appellee relies. We do not believe that the constitutional privilege precludes requiring a taxpayer to provide such information. Cf. *Greenberg* v. *United States*, 343 U.S. 918.

It is no doubt true that if a person were engaging in a lottery and using the mails or interstate commerce in so doing, the disclosure of his places of business and employees could be said to furnish a "link in the chain of evidence" necessary to prosecution. *Hoffman* v. *United States*, 341 U.S. 479, 486; *Patricia Blau* v. *United States*, 340 U.S. 159; *Greenberg* v. *United States, supra.* But those cases and the principles for which they stand must be read in their context—that of grand jury investigations into the very matters as to which the witnesses were questioned. If tax reports are restricted at all by the self-incrimination clause of the Fifth Amendment (but see pp. 24-30, *infra*), they should not be subjected to as stringent a limitation as is questioning in the course of an inquiry likely to lead to prosecution.

Thus even though it may be assumed that the "link in the chain" principle would be applicable, the *Hoffman* case makes it clear that "the setting in which [the question] is asked", the "background" and the "peculiarities" of the particular case are important in determining whether a claim of privilege is far-fetched or reasonable. 341 U.S. at 486-7. In the *Hoffman* case, the witness' refusal to answer questions relating to his occupation was

upheld because in the circumstances of that case, it appeared that the witness had "reasonable cause to apprehend danger from a direct answer." 341 U.S. at 486, citing *Mason* v. *United States*, 244 U.S. 362, 365. The witness, who had a twenty-year police record, was one of twenty notorious racketeers subpoenaed to appear before a grand jury called expressly to investigate "the gamut of all crimes covered by federal statute." 341 U.S. at 487. In such a setting, the witness might justifiably feel that he was the target for future prosecution under federal narcotics, internal revenue, white slavery, or other laws, particularly as he had already served a sentence on a narcotic charge. 341 U.S. at 489.

Consequently, questions which in other surroundings might be thought to be innocuous and to have only a tenuous connection with a possible federal offense could reasonably be thought to be incriminating. One who is required to register pursuant to the federal revenue laws is not in a comparable situation. He is not before an antagonistic prosecutor and a hostile grand jury with power to bring him to trial. He has not been singled out and publicized as a probable law-violator, but on the contrary is one of a large group, few of whom are likely to have violated the narrowly drawn and strictly construed [17] federal lottery provisions.

Such information, when sought in order to make

[17] *France* v. *United States*, 164 U.S. 676; *Francis* v. *United States*, 188 U.S. 375; *United States* v. *Halseth*, 342 U.S. 277.

possible collection of a valid tax, is not given in a setting which makes the danger of prosecution for violation of the federal lottery laws reasonably likely—even if the same question in a grand jury investigation might be barred.

If the "link in the chain" test which is applied to questions to witnesses in an investigation or trial were applicable as strictly to tax returns, the result would be that no one engaged in, or receiving income from, or claiming a deduction because of, a possibly illegal activity could be required to report anything which might afford a prosecutor a helpful clue—which means he would not be required to report as to such income at all. For even to report an amount of income not identified as coming from a *lawful* occupation *could* aid a prosecutor seeking to establish that a taxpayer was engaged in a particular unlawful one. The statements of a taxpayer's address in an ordinary tax return *could* have a similar effect. The same would be even more clearly true of the ordinary questions as to the source of income, or the nature of a business from which profit is derived, or as to information returns such as accompany the payment of withholding taxes on employees, which require the disclosure of the employees' identities. If persons could avoid reporting any information as to such matters—address, amount, occupation, source of income, recipient of deduction—on the ground of a possible link to an unlawful activity, the tax return would be of no value. This would in practical effect make it impossible to collect taxes from such

persons, or at least to collect taxes which would bear any relation to the amount for which the persons were liable.

And yet it is well established that income from gambling, as well as from other unlawful occupations, must be reported for federal income tax purposes.[18] The cases sustaining the authority of Congress to impose taxes on occupations illegal under *federal* law are especially significant in this connection. It was held in a number of cases that persons engaged in selling liquor during the period of national prohibition were still required to pay the federal taxes on the forbidden traffic. *United States* v. *Stafoff*, 260 U.S. 477, 480; *United States* v. *One Ford Coupe*, 272 U.S. 321, 327; *United States* v. *Sullivan*, 274 U.S. 259, 263. The very fact of paying a tax which was collectible only from persons engaged in an unlawful activity might be directly incriminating, far more so than is the information sought here. For payment could be regarded as an admission of guilt, not merely a clue to possible guilt. The decisions per-

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[18] *Rutkin* v. *United States*, 343 U.S. 130, 137, 140; *Johnson* v. *United States*, 318 U.S. 189 (money paid to political leader as protection against police interference); *United States* v. *Sullivan*, 274 U.S. 259 (illicit traffic in liquor); *Humphreys* v. *Commissioner*, 125 F. 2d 340 (C.A. 7) (protection payments to racketeer and ransom paid to kidnaper); *Chadick* v. *United States*, 77 F. 2d 961 (C.A. 5) (graft); *United States* v. *Commerford*, 64 F. 2d 28 (C.A. 2) (bribes); *Patterson* v. *Anderson*, 20 F. Supp. 799 (S.D. N.Y.) (unlawful insurance policies); *Petit* v. *Commissioner*, 10 T. C. 1253 (black market gains); *Droge* v. *Commissioner*, 35 B.T.A. 829 (lotteries); *Rickard* v. *Commissioner*, 15 B.T.A. 316 (illegal prize fight pictures); *McKenna* v. *Commissioner*, 1 B.T.A. 326 (race track bookmaking).

mitting taxation of such activities must mean that the forced disclosure in a tax return of information necessary to the collection of the tax does not violate the Fifth Amendment—for otherwise the decisions would be meaningless. These cases would support the reporting requirement of the tax on wagers even if the information sought were much more directly incriminating than it is.

C. THE PRIVILEGE AGAINST SELF-INCRIMINATION HAS NO APPLICATION TO INFORMATION REQUIRED TO BE FILED IN CONNECTION WITH THE COLLECTION OF TAXES.

In what has been said above we do not mean to suggest that the filing of the information required in the registration statement would be constitutionally privileged at all. A tax return which is reasonably adapted to the enforcement of a tax is a record required by law to be kept, and no more protected by the privilege than the records required to be kept for regulatory purposes in *Shapiro* v. *United States*, 335 U. S. 1. This must at least be so when the required report or return does not call for information which is incriminating on its face.

1. As long ago as *Boyd* v. *United States*, 116 U. S. 616, this Court indicated that records required to be kept for inspection under the revenue laws were not protected by the Fourth Amendment, and presumably also not by the Fifth. See 116 U. S. at 623-624.[19] This principle was applied to other

[19] "So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures."

records required to be kept by regulatory statutes in *Wilson* v. *United States,* 221 U. S. 361, *Davis* v. *United States,* 328 U. S. 582, and most recently in *Shapiro* v. *United States,* 335 U. S. 1. In the *Shapiro* case, the Court held that a licensee under O. P. A. price regulations could be compelled to disclose records which the O. P. A. required him to keep, even though such records might tend to incriminate him of violating the price control laws. The opinion stated (335 U. S. at 32-33):

> It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator. * * * Accordingly, the principle enunciated in the *Wilson* case, and reaffirmed as recently as the *Davis* case, is clearly applicable here: namely, that the privilege which exists as to private papers cannot be maintained in relation to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation

and the enforcement of restrictions validly established."

In the *Shapiro* case, the basic activity was prescribing commodify prices in a war emergency. It was not questioned that Congress had power to undertake such regulation, nor that the record-keeping requirement of the Price Control Act was a legitimate exercise of that power. In the present case, the taxing power of Congress is involved. It is clear that Congress may, in the exercise of that power, impose occupational and excise taxes as was done here. As we have shown in our main brief (pp. 21-24), this Court has many times affirmed the power of Congress to enact registration and other provisions needed to enforce a tax validly imposed.

It would be inconsistent with the tenor of the *Shapiro* and *Wilson* cases, *supra,* to permit the Fifth Amendment to excuse one from transmitting information essential to the "enforcement of restrictions validly established." 221 U. S. at 380. There is no reason why this is any the less true for reports or records required under the taxing power than under the war or commerce powers. To the contrary, as the *Boyd* case indicates, the use of such incidental authority in the collection of taxes has been historically recognized without any thought that the compulsory reporting of information needed to collect taxes violated the Fifth Amendment. That the doctrine is applicable to income tax returns was indicated, although not

decided, in the unanimous opinion in the *Sullivan* case, wherein the Court stated (274 U. S. at 263-264):

> It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime.[20]

It would seem to be equally extravagant to permit the Fifth Amendment to prohibit enforcement of a different, but equally valid, federal tax.

2. The privilege against self-incrimination is also not applicable because the registration statement required by the tax on wagers does not require disclosure of unlawful activities. The tax applies *in futuro*. No person need engage in the business of accepting wagers following enactment of the present statute. If he elects to remain in the business, he does so with full knowledge that the

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[20] For an able discussion of the interrelations of the *Shapiro* and *Sullivan* cases, see Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 715-719. The author concludes (p 717): "If the questions left open by the *Sullivan* case are resolved in the light of the purposes underlying the required-records doctrine, it seems likely that tax records will be given no more protection than records required by the O.P.A. It is true that the court in the *Shapiro* case spoke in terms of records required for regulatory purposes and that this language could be seized upon as a basis for distinguishing tax records and excluding them from the operation of the required-records doctrine. This distinction, however, lacks substance * * * It would be paradoxical for the Court, after having removed the privilege from records required as an incident of a regulatory program—in order to facilitate enforcement—to stop short where revenue records are involved."

federal government has imposed a tax on this occupation and that persons subject to the tax are required to submit information incidental to its collection. He cannot elect to continue in the business and reject the restrictions which Congress has placed upon it. He is put in the position of having to report information as to his business only because he chooses to place himself in that situation.

A very similar problem confronted the Court of Appeals of New York in *E. Fougera & Co. Inc. v. City of New York*, 224 N. Y. 269, 120 N. E. 642. A city ordinance required dealers in patent medicines to register the names of ingredients for which therapeutic effects were claimed with the Department of Health. It was stipulated by the parties that the objective of the ordinance was to secure information on which to base prosecutions for violations of law. 224 N. Y., at 278. To the contention that this ordinance violated the plaintiff's privilege against self-incrimination, the court, per Cardozo, J., replied (p. 279):

> The sale of medicines is a business subject to governmental regulation. One who engages in it is not compelled by this ordinance to expose himself to punishment for any offense already committed. *He is simply notified of the conditions upon which he may do business in the future. He makes his own choice. To such a situation, the privilege against self-accusation has no just application.* [Italics supplied.]

The same theory has been advanced by Wigmore [21] in a section of his treatise "cited with approval by the opinion of the Court" [22] in *Davis* v. *United States,* 328 U.S. 582, 590, and quoted at length in *Shapiro* v. *United States,* 335 U.S. 1, 35n, as follows:

> The State requires the books to be kept, but it does not require the officer to commit the crime. If in the course of committing the crime he makes entries, the criminality of the entries exists by his own choice and election, not by compulsion of law. The State announced its requirement to keep the books long before there was any crime; so that the entry was made by reason of a command or compulsion which was directed to the class of entries in general, and not to this specific act. The duty or compulsion to disclose the books existed generically, and prior to the specific act; hence the compulsion is not directed to the criminal act, but is independent of it, and cannot be attributed to it. . . . The same reasoning applies to *records required by law to be kept* by a *citizen* not being a public official, *e.g.*, a druggist's report of liquor sales, or a pawnbroker's record of pledges. The only difference here is that the duty arises not from the person's general official status, but from the specific statute limited to a particular class of acts. The duty, or compulsion, is directed as before, to the generic class of acts, not to the

[21] 8 Wigmore, *Evidence* (3d ed.) 1940, Sec. 2259c.

[22] The quotation is from *Shapiro* v. *United States,* 335 U.S. 1, 35n.

> criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty. [Italics as in the original.]

These principles are as applicable to a lawful tax as to a regulatory statute. A taxpayer is not required to engage in the business taxed. If he does so after passage of the taxing legislation, he must accept the conditions which Congress has imposed upon anyone who engages in such an enterprise. In the language of the then Judge Cardozo "He is simply notified of the condition upon which he may do business in the future. He makes his own choice. To such a situation the privilege against self-incrimination has no just application."

Respectfully submitted,

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